IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR.

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J U D G M E N T

Union of India Vs. M/s. Perfect Thread Mills Ltd. & Anr.

D.B. CENTRAL EXCISE APPEAL NO.41/2006.

Date of Judgment :::: 10th August 2007.

PRESENT

HON'BLE MR. JUSTICE P.B. MAJMUDAR
HON'BLE MR. JUSTICE DINESH MAHESHWARI

Mr. V.K. Mathur, for the appellant.
Mr. Anjay Kothari, for the respondents.

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BY THE COURT: (Per Hon'ble Mr. Maheshwari, J.)

This appeal has been preferred by the Union of India through the Commissioner, Central Excise, Jaipur-II under the then existing Section 35G of the Central Excise Act, 1944 ('the Act of 1944') being aggrieved by the order dated 28.03.2005 made by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi ('the Tribunal') in Appeals Nos. E/4167-68/04-NB(SM) reducing the penalty imposed upon the respondent No.1-assessee under Section 11AC of the Act of 1944 to an amount of Rs.50,000/- and has set aside the order

of imposition of penalty on the General Manager of the respondent-assessee.

This appeal was admitted on 08.08.2006 while formulating the following substantial question of law:-

> "Whether in the facts and circumstances of the case, Section 11AC is applicable to the facts of the present case and leaves any discretion with the authorities under the Act to reduce the penalty at less than equal to the duty determined where it is found that penalty is otherwise imposable under Section 11AC?"

Brief and relevant facts leading to the aforesaid order dated 28.03.2005 and this appeal could be summarised thus : The respondent No.1, Perfect Thread Mills Limited, Amberi, Udaipur is engaged in manufacture of both dutiable and exempted goods from common inputs. The officers of the appellant department made a surprise visit to the factory premises of the respondent-assessee on 10/11.01.2003 and carried out various checks including the accounts and during the course of checking of records, it was found that the assessee was availing CENVAT credit on inputs and such inputs were used in manufacture of dutiable and exempted goods without maintaining separate records for receipt and consumption of the inputs meant for use in manufacture of said dutiable and exempted goods. According to the

appellant, as per Sub-Rule (3) of Rule 6 of the erstwhile CENVAT Credit Rules, 2001 if the manufacturer opts not to maintain separate accounts and the final product falls under the Chapter 50 to 63 of the First Schedule to the Tariff Act, 1985, he shall pay an amount equivalent to CENVAT credit attributable to inputs used in or in relation to the manufacture of such exempted final products at the time of their clearance. However, the respondent-assessee had cleared the exempted goods, i.e., the dyed cotton yarn but had not paid an amount equivalent to the CENVAT credit attributable to inputs used in the manufacture of such exempted cotton yarn at the time of their clearance.

According to the appellant, the General Manager of the respondent-assessee in his voluntary statement recorded on 11.01.2003 under Section 14 of the Act of 1944 admitted that all the work relating to Central Excise was carried under his supervision; and further admitted that they were using the common inputs in the manufacture of dutiable as well as exempted final products and have not reversed the CENVAT credit from October 2001 to December 2002 in respect of dyes and chemicals, and from January 2002 to December 2002 in respect of grey yarn used in the manufacture of exempted goods. On being asked by the officers, the Manager reversed the entry.

The appellant submits that the respondent-assessee knowingly and intentionally, and by suppressing the facts, had not paid an amount of Rs.3,06,574/- attributable to inputs used in the manufacture of exempted goods at the time of their clearance and hence, a show cause notice was issued to the respondent for recovery of the aforesaid amount along with interest under Rule 12 of the Credit Rules read with proviso to Section 11A(1) and Section 11AB of the Act of 1944; a penalty under Rule 13(2) of the Credit Rules read with Section 11AC of the Act of 1944 for willful suppression of facts with intent to evade payment of duty was also proposed; and so was proposed a penalty against the General Manager of the respondent-assessee as he was directly responsible for non-payment of the amount equivalent to the CENVAT credit attributable to the inputs used in or in relation to manufacture of exempted goods.

Proceedings under the said show cause notice were concluded by the Joint Commissioner, Central Excise, Jaipur-II under the adjudication order dated 19.08.2003 confirming the demand of Rs.3,06,574/- and for appropriation of the already deposited amount to the Government account.

The said authority had noticed in its order dated 19.08.2003 that the assessee had already debited the amount voluntarily (Rs.1,61,010/- on 11.01.2003 and Rs.1,45,564/- on

15.01.2003). The said adjudicating authority also imposed penalty equivalent to the amount of CENVAT ceredit under Rule 13(2) of the CENVAT Credit Rules, 2002 read with Section 11AC of the Act of 1944, also ordered recovery of interest under Rule 12 of the said Rules read with Section 11AB of the Act; and further imposed penalty of Rs.25,000/- on the General Manager of the assessee under Rule 26 of the Central Excise Rules, 2002.

The assessee and the said General Manager filed appeals before the Commissioner (Appeals-II), Customs & Central Excise, Jaipur. The appellate authority by his order dated 11.06.2004 upheld the original order to the extent it confirmed and appropriated the demand of Rs.3,06,574/- and imposed equal amount of penalty. However, the appellate authority reduced the penalty imposed on the General Manager from Rs.25,000/- to Rs.15,000/-.

The aforesaid order dated 11.06.2004 was taken in appeal by the respondent-assessee and the General Manager before the Tribunal particularly in relation to the imposition of penalty; and submitted that since the appellants had already paid the duty before issuance of show cause notice, no penalty was imposable. However, the Tribunal was of the view that the appellants had failed to debit the CENVAT credit on inputs used for manufacture of exempted goods at the time

of clearance of such exempted goods; and they utilised this credit for clearance of dutiable goods. The appellate Tribunal, therefore, found and held that the intention to evade payment of duty was clear and, therefore, penalty was imposable on the respondent-assessee. However, considering the fact that the assessee had deposited the duty amount before issuance of show cause notice, the Tribunal proceeded to reduce the quantum of penalty on the assessee to Rs.50,000/-; and finding no ground for imposition of penalty on the General Manager, set aside the same.

This appeal has been preferred by the department on the grounds that on the admitted fact situation, the intention to evade payment of duty being clear, and such intention having concurrently been found by the authorities and confirmed by the learned Tribunal, there was no occasion for reducing the amount of the penalty. It is contended that reduction of the penalty imposed under Section 11AC of the Act of 1944 remains contrary to the statutory requirements and contrary to the dictum of the Hon'ble Supreme Court in the case of M/s. Sony India Limited Vs. C.C.E., Delhi : 2004 (167) ELT 385.

As noticed at the outset, this appeal was admitted on 08.08.2006 particularly on the question as to whether there was any discretion with the authorities under the Act to reduce the penalty at less than equal the duty determined,

when it is found that the penalty is otherwise imposable under Section 11AC ?

During the course of consideration of this appeal, learned counsel appearing for the respondent No.1 filed cross-objections with prayer for condonation of delay in relation to the findings recorded against him in the order impugned. After expressing our reservations on the competence of such cross-objections, we permitted such cross-objections to be placed on board along with the present appeal and the office placed the same with the note that the said papers could not be inwarded for want of availability of category code. In the circumstances of the case and for the purpose of consideration of the issue sought to be raised by the respondent No.1, we directed the Registry to inward the said papers filed by the respondent No.1 for the time being as an interlocutory application, and accordingly, the said papers have been placed before us as IA No.2281/07 in this appeal.

Apart from opposing the submissions sought to be made in this appeal, it has been contended on behalf of the respondent, as averred in the said IA No.2281/07, that when the duty has been deposited before issuance of show cause notice, no penalty at all could be levied under Section 11AC of the Act of 1944 and this contention is fortified by the recent decision of this Court rendered in D.B. Central Excise Appeal

No.16/2006 : Union of India Vs. T.P.L. Industries Ltd., decided on 02.03.2007. It has been strenuously contended that admittedly the excise duty was deposited before issuance of show cause notice and the order of adjudicating authority order dated 19.08.2003 does not determine any other amount of excise duty due under Section 11A (2) of the Act of 1944 and, therefore, no penalty could be validly sustained under Section 11AC. It has also been contended that the finding on intention to evade the duty is based on surmises and assumptions and without any material to support the same. It has been urged that the fact that reversal of the CENVAT credit was made voluntarily by the appellant, and the amount of reversal was accepted by the adjudicating officer shows the bona fide of the appellant justifying non-levy of any penalty under Section 11AC of the Act of 1994.

An application under Section 5 Limitation Act has also been filed seeking condonation of delay in filing the cross-objections with the submissions that the assessee has recently come to know about the aforesaid judgment dated 02.03.2007 in T.P.L. Industries Limited wherein it has been held that no action under Section 11AC of the Act of the 1944 could be initiated or taken where the duty has been deposited before issuance of the show cause notice.

Having heard learned counsel for the parties and having examined the matter in its totality, we are of the view that this appeal cannot be considered to be involving any substantial question of law. A substantial question of law for the purpose of such appeal ought to be worthful and of substance. In the peculiar fact situation of the present case with the position of law obtainable from the binding decisions, this Court finds that even the very proposition of imposition of penalty upon the respondent under Section 11AC of the Act of 1944 is unsustainable.

In the aforesaid case of Union of India Vs. M/s. T.P.L. Industries Limited, decided on 02.03.2007, the duty was already deposited before issuing of show cause notice and the Tribunal set aside the levy of penalty by holding that since duty had been paid prior to issuance of show cause notice, no penalty was leviable under Section 11AC. The Division Bench of this Court has considered the question if the Tribunal was right in setting aside the penalty imposable as equal to the amount of duty under Section 11AC of the Act of 1944 because the assessee had deposited the amount of duty on being detected by the Department before issuance of show cause notice; and while referring to various decisions on the point, the Division Bench of this court has observed,-

> "The proposition appears to be well settled that where the duty has been deposited before

> issuance of show cause notice under Section 11A & Section 11AB of the Central Excise Act, 1944, no action under Section 11AC of the said Act for imposition of penalty can be initiated or taken. The reason is obvious. As on the date show cause notice is issued, there is no short levy of Duty for which such notices can be issued."

The fact that the duty was deposited before issuance of show cause notice is not disputed by the appellant either. In the circumstances of the case that the Tribunal had substantially granted the relief, albeit of reduction of the amount of penalty, obviously, the respondent-assessee choose not to challenge the order passed by the Tribunal.

While taking an overall view of the matter, we cannot ignore the decision of a co-ordinate Division Bench in T.P.L. Industries' case (supra) that such penalty is not leviable at all. In view of the aforesaid decision in T.P.L. Industries, we are clearly of opinion that when the levy of penalty itself is contrary to the propositions laid down by the Court, the question as to whether reduction of the penalty from the amount equal to the duty to a lesser amount was valid or not, is not a substantial question of law worth adjudication. The question whether the amount of penalty could be reduced or not pre-supposes that such penalty is validly imposed. With the ratio in T.P.L. Industries, the very leviability of such penalty is knocked out; and in our opinion, when the penalty

could not have been levied at all, it remains a question entirely irrelevant for the facts of the present case if the same could have been reduced or not. The question as proposed on behalf of the appellant ceases to be a substantial question of law when viewed in the light of the ratio of T.P.L. Industries, as noticed supra.

Upon our expressing such opinion, learned counsel Mr. Anjay Kothari appearing for the respondent-assessee in all fairness submitted that he would not like to press his cross-objections any further. In that view of the matter there arise no question of considering the question of condonation of delay in filing cross-objections.

In the aforesaid view of the matter, we are of the opinion that the appeal deserves to be dismissed for no substantial question of law being involved.

The appeal accordingly stands dismissed; and the cross-objections registered as IA No.2281/07 stand rejected as not pressed. No costs.

(DINESH MAHESHWARI), J. **(P.B.MAJMUDAR), J.**

[Mohan]